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No. 85-1742

In the Supreme Court of the United States

OCTOBER TERM, 1986

JULIAN W. RAWL, ADMINISTRATOR OF THE ESTATE OF EDWIN E. RAWL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ROBERT S. GREENSPAN
CHRISTINE R. WHITTAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

1318

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court erred in its application of the superseding cause doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 76-108) is reported at 778 F.2d 1009. The opinion of the district court (Pet. App. 2-73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1985. A petition for rehearing was denied on January 21, 1986 (Pet. App. 109-110). The petition for a writ of certiorari was filed on March 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, arises from the crash of a single-engine aircraft approximately six miles northeast of the Grand Strand Airport in North Myrtle Beach, South Carolina. The pilot, Edwin E. Rawl, Jr., left the airport at 5:45 p.m. on February 17, 1978, to fly to Greenville, North Carolina, to pick up his wife. He planned to return to Myrtle Beach by eight o'clock in order to host a business dinner. Rawl was experienced in flying under visual flight rules (VFR), under which a pilot must be able to fly by sight with a visibility of at least three miles. He was not, however, certified to fly by instrument flight rules (IFR), under which a pilot must be able to fly solely by instruments. Before taking off from North Myrtle Beach, Rawl learned that the weather report indicated VFR conditions with hazy visibility, but forecast that these conditions would deteriorate later in the evening. At the time of Rawl's take-off, conditions had already deteriorated to visibility of less than two miles with haze and fog. Since conditions had deteriorated below the requirements for a VFR clearance, Rawl was offered and accepted an IFR clearance to take off, although he was not qualified to accept that clearance. Pet. App. 79-80.

Rawl arrived at Greenville, picked up his wife, and departed again without checking the weather report. At 7:19 p.m. Rawl first made contact with the air traffic controller at the Grand Strand Airport. Rawl told the controller that he was flying VFR. The controller told Rawl that he could not land at the airport under VFR but agreed to let Rawl make his approach under "special VFR," even though a pilot must have an IFR rating to accept a special VFR clearance after

sunset. After a delay of more than half an hour while another small plane landed,[1] Rawl was cleared to approach the airport.[2] Pet. App. 80-82.

During the delay, Rawl had been flying between two layers of clouds at 1,000 and 3,000 feet and in darkness. Rawl asked for vectors to bring him down to a landing. At 8:05 p.m., while Rawl was flying on a heading of 45 degrees, the air traffic controller told him to turn left 135 degrees to a heading of 270 degress. Rawl was asked to state his heading about a minute and a half later. He replied that he was at 300 degrees, but the controller misunderstood and assumed he said 30 degrees.[3] Based on that assumption, the controller told Rawl to turn right to 120 degrees. A few moments later, a supervisor told the controller that he thought there had been a miscommunication. The controller asked Rawl to state his heading again and Rawl responded that his earlier heading had been

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[1] At 7:28 p.m. and again at 7:42 p.m., Rawl was told to expect a ten-minute delay while another plane, a Cessna, was brought in under special VFR. The Cessna pilot made several passes over the airport but was unable to see it. At 7:45 p.m. an emergency situation was declared for the Cessna. About five minutes later, after radio contact had been lost for a short while, the Cessna landed safely but came to rest in the grass at the end of the runway. Pet. App. 82.

[2] At about the same time, an air traffic controller suggested that another small plane divert to Wilmington, North Carolina, where the weather was significantly better. A similar suggestion was not made to Rawl. Nor did Rawl, who was on a different radio frequency, hear this suggestion. Pet. App. 83.

[3] Three numbers are provided when stating headings, so that a 300 degree heading is stated "three-zero-zero," while a 30 degree heading is stated "zero-three-zero." Because a portion of Rawl's transmission was inaudible, the air traffic controller heard only "three-zero." Pet. App. 84.

300 degrees and that he was now at 330 degrees. The controller told Rawl to turn left to 220 degrees. Shortly after this, the plane crashed, killing both Rawl and his wife. Pet. App. 83-85.

2. The district court found that Rawl went into a power dive and crashed because of "spatial disorientation." [4] The district court held that the air traffic controller negligently directed Rawl to make a series of abrupt turns after failing to ask for a clarification of his obviously incomplete heading report (Pet. App. 36-37). The district court also held that the controller negligently failed to suggest alternative airports where VFR conditions prevailed (*id.* at 43). The district court then considered the government's contention that Rawl had been contributorily negligent in attempting to land at North Myrtle Beach because a reasonably prudent pilot who did not have an IFR rating would have sought another landing site.[5] The court "[a]ssum[ed] *arguendo*" (Pet. App. 51) that Rawl was negligent, but concluded that the air traffic controller's negligent acts "were each intervening and superseding causes which relieved Mr. Rawl of any contributory negligence" (*id.* at 56).

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[4] As the court of appeals explained (Pet. App. 85 n.5):

> Spatial disorientation is a condition caused by conflicts between a pilot's visual references and inner sense of orientation in space. A pilot who is deprived of visual reference points, and who has not been certified to fly on instruments alone, may become enveloped in false sensations and will not know, quite literally, which way is up. The confusion often results in loss of control of the airplane.

[5] Under applicable South Carolina law, contributory negligence on the part of a plaintiff bars recovery.

3. The court of appeals reversed (Pet. App. 76-108). It did not question the district court's finding that the air traffic controller acted negligently (*id.* at 90). It also concluded that Rawl had been negligent, since he "flew in circumstances that a reasonable pilot with similar qualifications, or, perhaps, more accurately, with similar lack of qualifications, would have shunned" (*id.* at 95-96). The court noted that Rawl accepted IFR clearance to depart from the Grand Strand Airport although he was not qualified for it and then returned to the airport after dark in weather conditions that "he knew or should have known [would bar a] VFR landing" (*ibid.*). Under these circumstances, the court of appeals held that "the district court's application of the doctrine of 'intervening and superseding cause' to the facts adduced at trial was wrong as a matter of law" (*id.* at 92). The court noted that that doctrine is applicable when an extraordinary event, usually different in kind and independent of the negligent act that is superseded, intervenes between a negligent act and an injury (*id.* at 103-104). In this case, the court explained, the air traffic controller's negligence "did not qualify as an entirely unforeseeable and unexpected force brea[k]ing the causal connection" (*id.* at 102). Rather, the court held that the controller's and Rawl's negligence were "substantial, concurring causes of the crash" (*id.* at 105).

ARGUMENT

The court of appeals correctly decided that the district court erred in its application of the superseding cause doctrine under the facts of this case. Contrary to petitioner's claim, this case presents no issue on which the circuits disagree. Accordingly, there is no warrant for review by this Court.

1. Petitioner's principal contention (Pet. 26-42) is that the court of appeals improperly reversed findings of fact made by the district court without concluding that they were clearly erroneous, as required by Fed. R. Civ. P. 52(a). Petitioner's contention is in error. As the court of appeals stated (Pet. App. 92-93), the holding it reversed was a question of law rather than a question of fact, so the clearly erroneous standard did not apply.

The court of appeals accepted the district court's finding of negligence by the air traffic controller. Since the district court did not make a final determination as to whether or not Rawl was negligent, instead assuming arguendo that he was negligent in pursuing his plans to land at the Grand Strand Airport despite the weather (Pet. App. 51), the court of appeals' conclusion that Rawl was negligent did not conflict with the district court's findings of fact concerning Rawl's negligence.[6] The difference in result

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[6] The only conflict with the findings of fact was the court of appeals' statement (Pet. App. 96) that Rawl knew that another plane with a special VFR clearance had landed only with great difficulty, but nevertheless he insisted on trying to land. See Pet. App. 82. The court of appeals thus contradicted the district court's belief that Rawl was unaware of the difficulties the Cessna encountered, and made its own finding that Rawl knew of the Cessna's problems. Petitioner suggests that the court of appeals erred in not finding clearly erroneous the

is the consequence of the court of appeals' holding on superseding cause, and not the consequence of any disagreement on a question of fact.

The court of appeals, and not the district court, correctly applied the superseding cause doctrine. The harm caused by a superseding cause is usually different in kind from that which would have resulted from the prior negligence. See *Johnson* v. *Kosmos Portland Cement Co.*, 64 F.2d 193 (6th Cir.), cert. denied, 290 U.S. 641 (1933). A superseding cause is also usually extraordinary, rather than normal, in either its operation or its consequences. Restatement (Second) of Torts § 442(b) (1965). And, as the court of appeals noted (Pet. App. 104), a superseding cause is usually independent of the situation in which the prior negligence occurred. Thus, the essence of the theory of superseding cause is that the act which is claimed to be a superseding cause is an unforeseeable and unexpected force breaking the causal connection between the claimed negligence and the injury.

The air traffic controller's actions were not a superseding cause of the crash under these criteria.

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district court's conclusion that Rawl was not aware of the Cessna's probelms in locating the airport. Though the court of appeals did not explicitly state that the district court's belief was clearly erroneous, it did implicitly so hold when it stated that Rawl knew of the other plane's problems, while noting that "[t]he district court's findings of fact indicate a belief that Rawl was unaware of the Cessna's problems in locating the airport, and in landing" (Pet. App. 96 n.10). Moreover, the district court did clearly err because the record, as cited by the district court, showed that "Rawl was on the same frequency as that of the Cessna, and after the Cessna had landed, Rawl queried [the air traffic controller] as to the altitude at which the Cessna had broken through the cloud cover in descending to the runway" (*ibid.*).

Every negligent act of the air traffic controller was coupled with a similar negligent act by Rawl. Both knew or should have known that Rawl should not have left North Myrtle Beach while the weather was deteriorating or tried to land there after sunset in poor conditions. While the controller knew that conditions were better at the Wilmington, North Carolina, airport, Rawl knew that he had four hours of fuel left (Pet. App. 15), so he must have known that it would be possible to land in better conditions elsewhere. And the district court found that both the controller and Rawl knew or should have known that making a series of abrupt turns between two cloud layers could induce spatial disorientation (*id.* at 24-25). In short, the air traffic controller's negligence was in no sense different in kind or independent of Rawl's negligence. If either had adhered to the rules or taken precautions to avoid spatial disorientation the crash would not have occurred. But neither did and, as the court of appeals concluded (*id.* at 105), their negligence concurrently caused the crash.[7]

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[7] While stating that the district court was "wrong as a matter of law" (Pet. App. 92), the court of appeals also stated that it found "a mistake in the rule of law, or perhaps, a mistake in the application of law to the facts" (*id.* at 93). The court also noted (*id.* at 93 n.9) that the courts of appeals have differed somewhat in their approach to reviewing mixed questions of law and fact, as this Court has also noted (*Pullman-Standard* v. *Swint*, 456 U.S. 273, 289-290 n.19 (1982)). This case does not present an opportunity to resolve the disagreement concerning the proper standard of review of mixed questions of law and fact. Petitioner has not argued that review by this Court is warranted because of any disagreement in the circuits concerning review of mixed questions of law and fact.

2. Petitioner also contends (Pet. 42-63) that the decision of the court of appeals conflicts with decisions in other circuits. Specifically, petitioner claims that there is "a lack of uniformity among the circuits and within the Fourth Circuit on the scope of review by an appellate court of a trial court's findings of negligence" (Pet. 42). Petitioner's argument totally misses the mark. As we have shown, the court of appeals did not disagree with the district court's conclusions regarding negligence, either on the part of the air traffic controller or on the part of Rawl. Instead, the court reversed because the findings of fact simply did not allow the legal conclusion that the controller's negligence was a superseding cause of the crash. Thus, petitioner's assertions about the standard of review for findings of negligence are irrelevant.

(Petitioner did not cite *Pullman-Standard* or any of the cases cited by the court of appeals (Pet. App. 93 n.9).) In addition, the error of the district court is best considered an error of law, so that this case does not present a mixed question of law and fact. This Court has defined mixed questions of law and fact as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard" (*Pullman-Standard*, 456 U.S. at 289 n.19). In this case the rule of law is not undisputed because, as the court of appeals concluded, the district court misunderstood the superseding cause doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ROBERT S. GREENSPAN
CHRISTINE R. WHITTAKER
Attorneys

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